

East River Petroleum Realty, LLC v AC Woodhaven Realty Corp.

2011 NY Slip Op 31597(U)

June 3, 2011

Sup Ct, Nassau County

Docket Number: 000549-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
EAST RIVER PETROLEUM REALTY, LLC,

Plaintiff,

-against-

**AC WOODHAVEN REALTY CORP. d/b/a A.C.
WOODHAVEN, INC. and ADELMO CIOFFI,**

Defendants.
-----X

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 000549-11
Motion Seq. No.: 1
Submission Date: 4/22/11**

The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Affirmation in Opposition.....X**
- Memorandum of Law in Opposition.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion filed by Plaintiff East River Petroleum Realty, LLC ("East River" or "Plaintiff") on March 21, 2011 and submitted on April 22, 2011. For the reasons set forth below, the Court denies Plaintiff's motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing the counterclaim ("Counterclaim") interposed by Defendants AC Woodhaven Realty Corp. d/b/a A.C. Woodhaven, Inc. ("Woodhaven") and Delmo Cioffi ("Cioffi") (collectively "Defendants").

Defendants oppose the motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Lang Aff. in Supp.) describes this action as follows:

The instant action seeking monetary relief focuses on the defendants' breach of their contractual obligations to the plaintiff under a franchise agreement to operate a branded gasoline service station, inclusive of a related agreement to loan funds for the purpose of making improvements to the service station and a personal guarantee executed by the individual defendant. Specifically the defendants unlawfully terminated the franchise agreement and failed to repay the totality of the loaned funds.

Compl. at ¶ 1

The Complaint alleges, further, that as a result of Defendants' alleged breach, they are responsible to Plaintiff for 1) invoices for gasoline delivered to the service station, and other miscellaneous charges, 2) liquidated damages for failure to purchase a specified total number of gallons of gasoline pursuant to the terms of the franchise agreement, 3) the unamortized portion of the funds loaned to improve the service station, and 4) attorney's fees and costs incurred by Plaintiff in pursuing this action.

East River is a company principally engaged in owning, leasing, operating and managing gasoline service stations throughout the New York City area. Woodhaven is the owner and operator of a service station ("Station") located in Rego Park, New York. Cioffi is a principal of Woodhaven, and the individual owner of the property on which the Station is located.

The Complaint provides a copy of the franchise agreement ("Franchise Agreement") at issue, discusses relevant provisions of the Franchise Agreement and provides details regarding the assignment ("Assignment") of the Franchise Agreement by Mobil Oil Corporation ("Mobil") to East River. The Complaint also discusses the note, mortgage and personal guaranty ("Guaranty") executed by Cioffi to secure the loan ("Loan") at issue, and outlines the manner in which Defendants allegedly breached the Franchise Agreement and Guaranty. Mobil made the Loan to assist Woodhaven in making certain improvements to the Station ("Improvement Funds").

The Complaint contains six (6) causes of action: 1) against Woodhaven and Cioffi for liquidated damages, pursuant to the liquidated damages provision in the Franchise Agreement, in light of their alleged breach of the Franchise Agreement by, *inter alia*, "de-branding" (Compl.

at ¶ 32) the Station from Mobil to a non-Mobil brand, 2) against Woodhaven and Cioffi for the unamortized portion of the Improvement Funds, 3) against Woodhaven and Cioffi for the unpaid deliveries of motor fuels and related charges, 4) against Cioffi for breach of the Guaranty, 5) against Woodhaven and Cioffi for attorney's fees pursuant to the Franchise Agreement and Guaranty, and 6) against Woodhaven and Cioffi for conversion based on their alleged misappropriation of equipment ("Equipment"), including but not limited to price signs, that was leased to Woodhaven during the term of the Franchise Agreement.

Defendants interposed a Verified Answer with Counterclaims dated February 10, 2011 (Ex. C to Lang Aff. in Supp.). In their Counterclaim, based on breach of contract, Defendants allege that 1) Woodhaven entered into the Franchise Agreement; 2) Woodhaven performed all duties and obligations under the Franchise Agreement; 3) Plaintiff breached the Franchise Agreement by "unilaterally raising tank wagon ["DTW"] prices in bad faith such that the prices charged Defendants by Plaintiffs were not competitive" (Counterclaim at ¶ 15); and 4) as a result of Plaintiff's breach, Woodhaven has suffered damages in an amount to be determined at trial.

The Franchise Agreement does not specify the price that Woodhaven would pay to Mobil for the delivery of gasoline. The Franchise Agreement (Ex. B to Lang Aff. in Supp.) provides as follows at Section 2.2 ("Pricing Provision"):

For all Products purchased under this Agreement, Franchise Dealer [Woodhaven] shall pay Mobil the price that is in effect at the time and place of delivery for the class of customer in which [Woodhaven] then falls, as determined by Mobil. Unless otherwise specified by Mobil in writing, prices are prior to taxes and are subject to change by Mobil at any time and without notice.

In opposition, Cioffi affirms that, for the ten (10) years prior to the Assignment, he was able to operate the Station profitably because Mobil set its DTW prices, the prices that the supplier charges the dealer, "at competitive rates and in good faith" (Cioffi Aff. in Opp. at ¶ 4). Shortly after the Assignment, however, East River raised those prices. By way of example, on December 31, 2010, other suppliers offered gasoline for \$2.517 and \$2.512 per gallon. On that same date, East River charged \$2.659 per gallon, which was more than ten (10) cents per gallon above the price charged by competitors. This increase left Cioffi unable to compete with nearby gasoline stations.

Cioffi affirms, further, that East River left the Station without gasoline at least nine (9)

times in the months of November and December of 2010 and alleges that East River “has done everything in its power to put me out of business” (Cioffi Aff. in Supp. at ¶ 7). As a result of East River’s actions, Cioffi was forced to change to a different supplier of gasoline to remain in business.

C. The Parties’ Positions

Plaintiff submits that the Counterclaim is deficient as a matter of law because Defendants have pled no facts alleging that East River, a supplier of Mobil branded gasoline, acted in a commercially unreasonable manner in setting the price of the gasoline it delivered to the Station under the Franchise Agreement. Thus, Defendants have not overcome the presumption established by the Uniform Commercial Code (“UCC”) that the Franchise Agreement’s pricing provision is legal. Given that the Franchise Agreement contains an open price term, it is governed by UCC § 2-305 which requires a seller, such as East River, to fix the price in “good faith.” Plaintiff cites Official Comment 3 to this Section, and argues that the Comment “clearly expresses the drafters’ intent to create a safe harbor for open price contracts” (P’s Memorandum of Law in Supp. at p. 7). Plaintiff contends that Defendant’s mere allegation of bad faith, without details about the manner in which East River breached the pricing provision in the Franchise Agreement and its implied covenant of good faith and fair dealing, is insufficient to sustain the Counterclaim.

Defendants oppose Plaintiff’s motion, submitting that they have adequately alleged the elements of a breach of contract. They argue that the cases cited by Plaintiff are distinguishable because, in the cited cases, the non-moving party failed to allege the existence of a contract or the non-moving party was not a party to a contract. Defendants argue, further, that they are unable to articulate the manner or reason for Plaintiff’s bad faith until they have obtained discovery, which Plaintiff has not yet provided. Moreover, Defendants contend that they are not required to present evidence rebutting the presumption of good faith at the pleading stage; rather, the presumption of good faith “merely reaffirms the burden of Defendants to prove Plaintiff acted in bad faith” (Ds’ Memorandum of Law at p. 4).

In reply, Plaintiff submits that the Defendants have asserted a claim with no factual basis, in the hopes that discovery will provide support for their legal theory. Plaintiff argues that, under these circumstances, Defendants should have conducted discovery and, if appropriate,

moved to amend their answer.

Plaintiff contends, further, that Defendants have failed to allege facts establishing that Plaintiff did not charge a commercially reasonable price. Plaintiff notes that the Pricing Provision expressly reserves to East River, as the assignee of Mobil, the right to set prices. Plaintiff cites several federal cases supporting the conclusion that the Assignment and East River's raising of prices do not constitute a breach of the Franchise Agreement.

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Assignment

New York permits assignment of contractual rights and delegation of contractual duties, except where the contract calls for personal services, or prohibits assignment, or where assignment materially alters the rights and duties of the other party. *Cedar Brook Service Station, Inc. v. Chevron U.S.A., Inc.*, 746 F. Supp. 278, 283 (E.D.N.Y. 1990), *aff'd without op.*, 930 F.2d 908 (2d Cir. 1991), *cert. den.*, 502 U.S. 819 (1991), citing *Smith v. Craig*, 211 N.Y. 456, 461 (1914). In *Cedar Brook, supra*, the Court held that, provided the assignment at issue

was valid under state law, the Petroleum Marketing Practices Act (“PMPA”), 15 U.S.C.S. § 2801 *et seq.*, whose overriding purpose is to protect franchisees from arbitrary and discriminatory terminations or nonrenewals of their franchises, does not make that assignment a termination of a franchise or failure to renew a franchise relationship. *Id.* at 281-282.

C. Open Price Terms

New York UCC § 2-305, titled “Open Price Term,” provides as follows:

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

In *Atlantic Autocare, Inc. v. Shell Oil Products Company LLC et al.*, 605 F. Supp. 2d 463 (S.D.N.Y. 2009), the plaintiffs alleged that defendants 1) constructively terminated their franchise agreements in violation of the PMPA; and 2) breached the parties’ franchise agreements by setting gasoline prices in violation of the open price term provision of New York UCC § 2-305. *Id.* at 466. The franchise agreements at issue did not establish a price for the gasoline that defendant Motiva Enterprises LLC¹ sold to plaintiffs, but rather provided that Motiva would charge plaintiffs a DTW price, which is an “open price term” governed by N.Y.

¹ Motiva was a joint venture of the Shell Oil Company, Texaco, Inc. and Saudi Aramco. 205 F. Supp. 2d at 466.

UCC § 2-305. *Id.* at 471. The plaintiffs alleged that defendants violated N.Y. UCC § 2-305 by failing to set the DTW price in good faith. *Id.*

The plaintiffs in *Atlantic Autocare, supra*, argued that, because New York state courts have not applied N.Y. UCC § 2-305 in the context of gasoline franchise agreements, the Court should follow the District Court's reasoning in *Yonaty v. Amerada Hess Corp.*, 2005 U.S. Dist. LEXIS 22429 (N.D.N.Y. 2005) in which the Court concluded that "Although courts have adopted varying approaches in analyzing whether gasoline franchisors have set prices in good faith [under U.C.C. § 2-305], it is clear that, in order for Plaintiff to maintain a claim under any of these approaches, he must produce some evidence of improper motive, discriminatory pricing, or the pricing practices of other franchisees." 605 F. Supp. 2d at 471, citing *Yonaty, supra*, at * 17. The Court in *Atlantic Autocare* concluded that, even if it were to adopt the reasoning of *Yonaty*, the evidence offered by plaintiffs did not support a claim under N.Y. UCC § 2-305, in light of the Court's conclusions that 1) plaintiffs did not submit sufficient evidence to permit a reasonable fact finder to conclude that defendants set the DTW price with an improper motive; 2) plaintiffs offered no evidence that defendants engaged in discriminatory pricing; and 3) plaintiffs made no attempt to show that the DTW prices Motiva charged to plaintiffs were out of the range of DTW prices charged by other refiners in the market and, therefore, could not demonstrate bad faith by reference to the pricing practices of other franchisees. *Id.* at 471-472, quoting *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429, 434 and 438 (Tex. 2004) and *Yonaty* at * 17. The Court concluded that, even applying *Yonaty*, plaintiffs were unable to provide evidence of improper motive, discriminatory pricing or the pricing practices of other franchisees, and thus granted defendants' motion for summary judgment with respect to plaintiffs' N.Y. UCC § 2-305 claim. *Id.* at 472-473.

C. Application of these Principles to the Instant Action

Preliminarily, the Court concludes that Defendants have not established that the Assignment was invalid, and the Court will assume the validity of the Assignment for the purposes of this motion. The Court denies Plaintiff's motion, however, based on the Court's conclusion that, under the reasoning of *Atlantic Autocare* and *Yonaty*, discussed *supra*, and in light of Cioffi's affirmations regarding the lower prices charged by other suppliers, the Counterclaim adequately alleges a viable cause of action for Plaintiff's breach of the Franchise

Agreement, based on Plaintiff's bad faith in setting the DTW prices, by reference to the pricing practices of other franchisees.

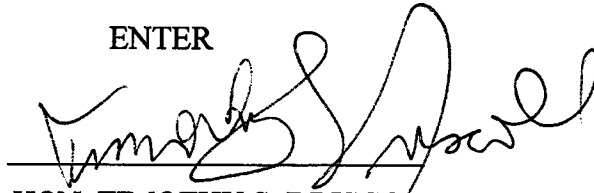
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on July 7, 2011 at 9:30 a.m.

DATED: Mineola, NY
June 3, 2011

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUN 07 2011
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